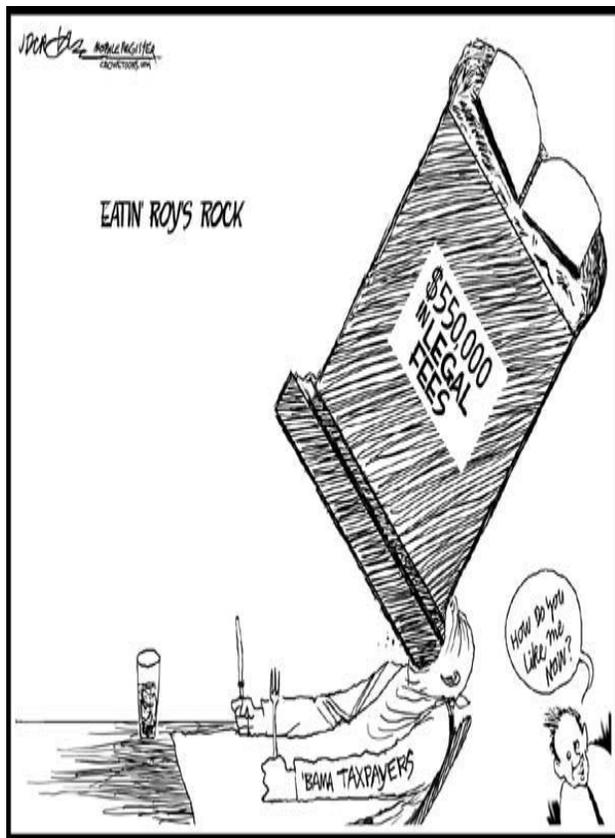


THE PUBLIC LAWYER

MAY 3, 2004



NEVADA CASES

<http://www.leg.state.nv.us/scd/OpinionListPage.cfm>

Kourafas v. Basic Food Flavors, Inc., 120 Nev. Adv. Op. 22 (April 28, 2004). “Appellant Christopher T. Kourafas, d/b/a The Architect’s Studio, appeals from a district court order dismissing his complaint with prejudice. In his complaint, Kourafas alleged that he was entitled to payment for construction management services provided

to respondent Basic Food Flavors, Inc. The district court agreed with Basic Food that Kourafas’ complaint was defective because he did not allege that he had a contractor’s license, and thus, he could not recover for construction management services. We disagree. We conclude that a contractor’s license is not necessarily required to recover for construction management services. We further conclude that the issue of whether Kourafas provided construction management services is a question of fact to be determined by a jury.”

Molina v. State, 121 Nev. Adv. Op. 21 (April 14, 2004). “Edward Molina appeals from a judgment of conviction entered upon pleas of guilty to one count of sexual assault and one count of lewdness with a child under the age of fourteen. He claims on appeal that the district court erred in denying his presentence motion to withdraw the guilty pleas. More particularly, Molina contends that his guilty pleas were the product of his lawyer’s inadequate assistance and thus not the result of knowing, voluntary and intelligent waivers of his trial rights. He also contends that the district court improperly allowed his attorney to reveal the substance of privileged attorney-client communications at the hearing on his motion to withdraw the guilty pleas. We affirm.”

Lara v. State, 121 Nev. Adv. Op. 20 (April



14, 2004). “Lara’s post-conviction counsel vigorously attacks the performance of both trial and appellate counsel and has at least implied that the Nevada judicial system treats the post-conviction process as a formality. While we appreciate the intensity with which post-conviction counsel has pressed this case, reasonable minds can most certainly differ on how a defendant in a criminal prosecution should be defended. Trial and appellate counsel in this matter were faced with a myriad of critical strategic and tactical dilemmas. We hold that the district court correctly denied Lara’s post-conviction petition for habeas corpus relief because his attorneys provided effective assistance at all stages of the trial and on appeal. We therefore affirm the judgment of the district court.”

Traffic Control Servs., Inc. v. United Rental Northwest, Inc., 121 Nev. Adv. Op. 19 (April 13, 2004). “Philip A. Burkhardt and his current employer, Traffic Control Services, Inc., d/b/a Allied Trench Shoring Services, appeal the issuance of a preliminary injunction enforcing a noncompetition covenant in favor of United Rentals Northwest, Inc., the purchaser of the corporate assets of Burkhardt’s former employer, NES Trench Shoring. The primary issue on appeal is whether an employer in a corporate sale may assign rights under an employee’s covenant not to compete without the employee’s consent.~ We hold that an employer may only assign such covenants with the employee’s consent and only when the consent is supported by independent consideration.”

In the Matter of the Guardianship of L.s. and H.S., 121 Nev. Adv. Op. 18 (April 6, 2004). “This is an appeal from a district court order appointing respondents, Valley Hospital Medical Center and Michele

Nichols, R.N., Administrator for Valley Hospital (collectively, Valley Hospital), as temporary guardians of the minor child H.S. Appellants Jason S. and Rebecca S., H.S.’s natural parents, appeal, arguing that the district court erred when it appointed Valley Hospital temporary guardian of H.S. pursuant to NRS 159.052. We disagree. We conclude that when the parents refused to consent to medically necessary care for H.S. based on their religious convictions, the district court did not abuse its discretion in appointing Valley Hospital as a temporary guardian to make decisions to provide medically necessary, life-saving treatment for H.S.”

SANCTIONS: Minnesota District Court Imposes Sanctions for Baselessly Opposing Routine Extension

Say what you will about the lore that Minnesota folks are nice, but here's an opinion that many courts and lawyers should study. A Minnesota federal district court imposed approximately \$1,000 in sanctions on a lawyer for refusing to consent to a routine extension to answer, instead demanding as a quid pro quo essentially the relief sought in the complaint, and then informing the court that he did not intend to respond to the extension request. Schaffhausen v. Bank of America, 2004 U.S. Dist. LEXIS 1773 (D. Minn. Feb. 2, 2004). The Moral: Be nice. Or else. (One of your authors has several lawyers he plans to share this opinion with in the near future.) <http://www.ethicsandlawyering.com>

NINTH CIRCUIT CASES

(Cases without hyperlinks can be found at <http://www.ca9.uscourts.gov/ca9/newopinions.nsf>)



Jeff D. v. Kempthorne, No. 00-35948 (9th Cir. April 23, 2004). “For over two decades, the district court has overseen a series of consent decrees entered into by appellants, the Governor of Idaho and other state officials, to remedy alleged constitutional and statutory violations in the provision of services to a class of more than 2,000 indigent Idaho children who suffer from severe emotional and mental disabilities. At this stage of the litigation, the state officials invoke Eleventh Amendment immunity and also contend that the district court no longer has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 to enforce the consent decrees. In essence, after promising so much over the past twenty years, the officials now claim that those promises are not enforceable. The district court rejected these arguments, and the state officials have appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the district court continues to have jurisdiction and that the Eleventh Amendment does not bar the enforcement of the consent decrees. We therefore affirm and return this case to the district court.”

United States v. Rivas-Gonzalez, No. 03-30167 (9th Cir. April 22, 2004). “The United States appeals a decision of the district court to depart downward by eight levels in sentencing an alien who was charged with illegal reentry after having been previously removed. We have jurisdiction under 18 U.S.C. § 1291 and we reverse.”

United States v. Viayra, No. 02-10336 ((th Cir. April 21, 2004). “The question of first impression that we must resolve is whether, in a criminal case, a district court may grant a new trial absent a request by the defendant. Specifically, may a court sua sponte convert a Federal Rule of Criminal Procedure 29

motion for judgment of acquittal into a Federal Rule of Criminal Procedure 33 new trial motion? The answer to this question lies in the text of the rules and the accompanying Advisory Committee Notes, which pointedly distinguish the two rules and the role of the court and of counsel. We conclude that a district court lacks authority to grant a new trial on its own motion.”

Chamber of Commerce of the United States v. Lockyer, No. 03-55166 (9th Cir. April 20, 2004). “This case presents a convergence of two important governmental interests: the ability of states to control the uses of state funds and the federal government’s national labor policy, expressed through the National Labor Relations Act. The question is whether these two interests conflict here, such that the NLRA overrides California’s interest. Specifically, a California statute forbids employers who receive state grants or funds in excess of \$10,000 from using such funding to advocate against or in favor of union organizing. We are constrained to conclude that California—acting as a regulator, not a proprietor in imposing these restrictions—has acted in such a way as to undermine federal labor policy by altering Congress’ design for the collective bargaining process. Therefore, we hold that the California statute as written is preempted by the NLRA.”

Clement v. California Dep’t of Corrections, No. 03-15006 (9th Cir. April 20, 2004). “Plaintiff/Appellee Frank Clement, an inmate at Pelican Bay State Prison, alleges in this 42 U.S.C. § 1983 action that his First Amendment rights were violated by Pelican Bay’s enforcement of its policy prohibiting inmates from receiving mail containing material downloaded from the internet. The district court denied the motion for summary judgment by the defendants/appellants, the



California Department of Corrections and the individual corrections officials. The district court then sua sponte granted summary judgment for Clement and issued a permanent, statewide injunction against the enforcement of the internet mail policy. CDC appeals. We affirm the district court's judgment and uphold the injunction."

Arredondo v. Ortiz, No. 01-57166 (9th Cir. April 20, 2004). "John Gary Arredondo appeals from the district court's denial of his 28 U.S.C. § 2254 habeas petition. Arredondo was convicted by a superior court jury in April 1999 of assault by means of force likely to produce great bodily injury and battery with serious bodily injury in violation of California Penal Code §§ 243(d), 245(a)(1). The only issue before us is whether the trial court violated Arredondo's Sixth Amendment right to present a defense by refusing to order a witness to testify after the witness invoked his Fifth Amendment privilege against self-incrimination as to prior convictions and pending charges. As the California Court of Appeal's decision upholding the trial court's ruling did not run afoul of clearly established law as determined by the United States Supreme Court, we affirm."

United States v. Meek, No. 03-10042 (9th Cir. April 19, 2004). "Jeffery Meek entered a conditional guilty plea to one count of using the Internet to attempt to induce a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). At issue on appeal is whether the district court erred in denying Meek's motions to suppress evidence and to dismiss the indictment. Meek challenges the legality of the search of his records at America Online ("AOL"), whose Internet services Meek used, as well as the search of his home, computer, and vehicle. We also consider whether § 2422(b)

applies where the person believed to be a minor is actually an adult police detective posing as the minor and, if so, whether the statute is unconstitutional. We reject these challenges and affirm the conviction. Both search warrants were valid, an attempt conviction under § 2422(b) does not require an actual minor victim, and the statute is constitutional as applied to Meek."

Ramirez v. Castro, No. 02-56066 (9th Cir. April 19, 2004). "The State of California through its Attorney General, Bill Lockyer, appeals from the district court's judgment granting a writ of habeas corpus to petitioner Isaac Ramirez on the grounds that (1) his 25-years-to-life sentence under California's 'Three Strikes' law, Cal. Penal Code §§ 667, 667.5, and 1170.12, violated his Eighth Amendment right to be free from cruel and unusual punishment, and (2) the California Court of Appeal's decision to the contrary was objectively unreasonable under 28 U.S.C. § 2254(d)(1). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm the district court.

In May 1996, Ramirez was caught walking out of a Sears department store in broad daylight carrying a \$199 VCR for which he had not paid. He immediately surrendered to authorities and returned the VCR; the encounter was without violence. For this crime, prosecutors could have charged Ramirez with a petty theft misdemeanor, punishable by up to six months in county jail. Instead, prosecutors chose to use two nonviolent shoplifting offenses to which Ramirez pleaded guilty in 1991, for both of which he served one sentence of just over six months in county jail, to charge him with one count of petty theft with a prior theft related conviction, a 'wobbler' offense in California punishable as a felony."



The San Remo Hotel v. San Francisco, No. 03-15853 (9th Cir. April 14, 2004). “In the second appeal before this court, the owners of the San Remo Hotel challenge the constitutionality of a San Francisco ordinance which restricts an owner’s ability to convert ‘residential’ hotel rooms to tourist use. A prior panel ordered Pullman abstention at plaintiffs’ request, and also declared some claims unripe, deferring a decision until after the claim had been litigated in the California courts. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). After losing their state takings claims in the California courts, *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002), the plaintiffs now seek to assert their federal takings claims in federal court. However, we agree with the district court that the California Supreme Court’s adjudication of the state takings claims was an ‘equivalent determination’ of the federal takings claims, and that plaintiffs are therefore barred from relitigating the takings issues by the doctrine of issue preclusion, pursuant to this circuit’s precedent in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), and *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998).”

Fortyune v. America-Multi Cinema, Inc., No. 02-57013 (9th Cir. April 14, 2004). “Robin Fortyune is a C-5 quadriplegic who requires both a wheelchair and an aide to attend movie theaters. Fortyune and his wife Felicia attempted to view American Multi-Cinema’s screening of the film *Chicken Run*, but were prevented from doing so when a man and his son refused to vacate the wheelchair “companion seats” that they occupied. AMC’s manager informed the Fortynunes that, under company policy concerning the use of wheelchair companion seats at sold-

out screenings, he could not require the man and his son to change seats. Spurned and publicly humiliated, the Fortynunes left the theater—Mrs. Fortyune in tears. At issue is whether Fortyune had standing to, and in fact did, establish a viable claim of discrimination under the Americans with Disabilities Act. We must also decide whether the district court’s injunction requiring AMC to ensure that wheelchair-bound patrons be permitted to sit beside their companions affords such patrons preferential treatment or runs afoul of the specificity requirements set forth in Federal Rule of Civil Procedure 65(d). As explained more fully below, we conclude that Fortyune properly brought and established a claim under the ADA and that the district court’s injunction is both nondiscriminatory and adequately specific. We, therefore, affirm the district court’s order granting the Fortynunes summary judgment and injunctive relief.”

United States v. Jimenez-Borja, No. 03-50141 (9th Cir. April 9, 2004). “We hold today that a previously-deported alien can be deemed to have been “found in” the United States when he was found by local police. He need not have been found by the INS.”

United States v. Blaine County, No. 02-35691 (9th Cir April 7, 2004). “Section 2 of the Voting Rights Act prohibits any voting procedure that results in a denial of the right to vote. 42 U.S.C. § 1973. The United States brought this section 2 action against Blaine County alleging that the County’s at-large voting system for electing members to the County Commission prevents American Indians from participating equally in the County’s political process. The district court determined that section 2 was a constitutional exercise of Congress’s powers under the Fourteenth and Fifteenth



Amendments, and that Blaine County’s at-large voting system violated section 2. In this appeal, Blaine County challenges both of those rulings. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.”

Olson v. Idaho State Bd. of Medicine, No. 02-35796 (9th Cir. April 7, 2004). “Lorna A. Olsen brought this action against the Idaho State Board of Medicine, the Idaho State Board of Professional Discipline, the individual members and counsel of the Board and BOPD, and the Executive Director of the Board, alleging both state law and federal statutory and constitutional violations. Specifically, Olsen alleges that beginning in 1996, appellees engaged in a protracted administrative process motivated by religious discrimination, which precluded the reinstatement of her physician assistant’s license, and thereby deprived her of her equal protection and due process rights, as secured by the United States Constitution. Accordingly, Olsen brought suit, asserting claims under 42 U.S.C. §§ 1983, 1985 and Idaho state law.

The district court granted appellees’ motion for summary judgment and dismissed Olsen’s claims. Because the district court correctly ruled that appellees are functionally comparable to judges and prosecutors and are accordingly entitled to the protections of absolute immunity for their quasi-judicial and quasi-prosecutorial acts, we affirm. We conclude also that none of appellees’ alleged administrative acts supports a cognizable § 1983 claim and that Olsen’s claim under § 1985 fails to allege sufficient facts to support a cause of action for conspiracy.”

HEALTH CARE TAX

In a recent QuickPoll conducted by BenefitNews.com, an overwhelming 96% of

respondents say that the General Accounting Office's recent proposal to impose a tax on employer-paid health insurance simply cannot work and wondered what the GAO was thinking. Just 4% took the view that it can't hurt in an attempt to reduce costs. The survey included over 250 responses. www.benefitnews.com

Flex time

BenefitNews.com Connect asked its readers if they featured a flex time program to accommodate employee schedules. With over 200 responses, the breakdown is as follows:

- 42% allow flex time on an informal basis
 - 32% do not allow flex time
 - 27% have an official flex time policy
- www.benefitnews.com



OTHER CASES

United States v. Cedano-Medina, No. 03-2980 (8th Cir. April 30, 2004). After



reviewing the video tape of the traffic stop and the request for consent to search the vehicle, a reasonable person could believe that defendant consented to the search. District court did not clearly err in concluding consent was not the result of duress or coercion.

<http://caselaw.lp.findlaw.com/data2/circs/8th/032980p.pdf>

Gonzales v. City of Castle Rock, No. 01-1053 (10th Cir. October 15, 2002). A court-issued domestic restraining order, whose enforcement is mandated by state statute, creates a property interest protected by the due process clause of the Fourteenth Amendment. Dismissal of procedural due process claim is reversed as to the City; individual police officers are entitled to qualified immunity. (On rehearing en banc).
<http://laws.lp.findlaw.com/10th/011053.html>

Stumpf v. Mitchell, No. 01-3613 (6th Cir. April 28, 2004). Death row inmate is entitled to habeas relief on the basis of two claims: that his guilty plea was not voluntary, knowing and intelligent, and that his due process rights were violated by prosecution's use of inconsistent, irreconcilable theories to convict both him and his accomplice.
<http://laws.lp.findlaw.com/6th/04a0124p.html>

United States v. Velazquez-Rivera, No. 03-1185 (8th Cir. April 27, 2004). Officers had probable cause to stop and arrest defendant based on a corroborated tip from a confidential informant and defendant's behavior once he became aware he was under surveillance; prosecutor established a non-discriminatory basis for the strike of a juror with an Hispanic surname.
<http://caselaw.lp.findlaw.com/data2/circs/8th/031185p.pdf>

United States v. Sanapaw, No. 03-2786 (7th Cir. April 27, 2004). The Controlled Substances Act of 1970 banned all forms of marijuana containing THC, not merely the species known as *Cannabis sativa* L.
<http://caselaw.lp.findlaw.com/data2/circs/7th/032786p.pdf>

United States v. Gonzalez, No. 03-2263 (8th Cir. April 26, 2004). When both sides cannot agree upon a stipulated transcript of translated conversations, each side may introduce its own version; when the transcript contains foreign drug code, the party introducing the transcript should ask the translator to identify the foreign word's ordinary English meaning before requesting an opinion as to the word's contextual meaning; while the district court did not follow this procedure here, any error was harmless.

<http://caselaw.lp.findlaw.com/data2/circs/8th/032263p.pdf>

State v. Castillo, No. SC03-282 (Fla. April 22, 2004). A violation of Florida's unlawful compensation statute, which prohibits public officials from seeking or accepting unauthorized benefits in return for performance or nonperformance of official duties, may be proven through circumstantial evidence; a specific agreement need not be shown.

http://caselaw.lp.findlaw.com/data2/floridastatecases/4_2004/sc03-282.pdf

Muntaqim v. Coombe, No. 01-7260 (2d Cir. April 23, 2004). The Voting Rights Act, which prohibits voting qualifications that result in the abridgment of the right to vote on account of race, cannot be applied to draw into question the validity of New York State's felon disenfranchisement statute, which disenfranchises currently incarcerated



felons and parolees.

<http://caselaw.findlaw.com/data2/circs/2nd/017260p.pdf>

Alidani v. Dooley, No. 03-1372 (8th Cir. April 23, 2004). Denial of habeas petition is affirmed. Trial judge's comments to the minor victim that she did not have to take the oath again and by saying to her "I know you're going to tell the truth" did not result in a denial of due process and a fair trial.

<http://caselaw.lp.findlaw.com/data2/circs/8th/031372p.pdf>

United States v. Hatfield, No. 03-4403 (4th Cir. April 23, 2004). The knock-and-announce rule does not apply to bar the introduction into evidence of the pistol obtained in this reasonable unannounced entry. Defendant's statement "the door is open; come on in" was voluntary and gave consent to enter to whoever was standing at his door.

<http://caselaw.findlaw.com/data2/circs/4th/034403p.pdf>

Madej v. Briley, No. 04-1760 (7th Cir. April 21, 2004). District court properly refused to vacate the habeas writ entitling petitioner to a new sentencing hearing. The commutation of his capital sentence to a natural-life sentence has not rendered the writ moot, since it entitles him to seek an ordinary life sentence.

<http://caselaw.lp.findlaw.com/data2/circs/7th/041760p.pdf>

Dodd v. United States, No. 02-16134 (11th Cir. April 16, 2004). For purposes of a newly recognized right under 28 U.S.C. section 2255(3), the one-year statute of limitations begins to run on the date the Supreme Court initially recognizes the right. Accordingly, prisoner's habeas motion is time-barred and its dismissal is affirmed.

<http://caselaw.lp.findlaw.com/data2/circs/11th/0216134p.pdf>



Today's Word:

Bedizen *(Verb)*

Pronunciation: [be-'dl-zên]

Definition 1: To dress up in a flashy fashion, to deck (oneself) out brazenly in gaudy clothes.

Today's Word:

Sequacious *(Adjective)*

Pronunciation: [see-'kwey-shês]

Definition 1: (1) Inclined to follow rather than lead, conformist, following others in thought and behavior; (2) continuing in a consistent direction, as a line of reasoning.

www.dictionary.com



NEW FLSA RULE INFORMATION

U.S. Department of Labor Proposal to Strengthen Overtime Protection

Side-By-Side Comparison

The following charts compare the current requirements for exemption from the Fair Labor Standards Act as an executive, administrative, professional, computer or outside sales employee with the regulations proposed by the Department of Labor.

Executive Employees			
	Current Long Test	Current Short Test	Proposed Standard Test
Salary	\$155 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p> <p>Customarily and regularly exercises discretionary powers.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p>	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p>



Administrative Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	\$155 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p> <p>Regularly and directly assists a proprietor, or exempt executive or administrative employee; or performs specialized or technical work requiring special knowledge under only general supervision; or executes special assignments under only general supervision.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p>	<p>Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.</p> <p>Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.</p>



Learned Professional Employees			
	Current Long Test	Current Short Test	Proposed Standard Test
Salary	\$170 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work.</p>	<p>Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment</p>	<p>Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience</p>

UNITED STATES DEPARTMENT OF LABOR

Welcome to the FairPay Web site. It's designed to help you understand the Department's new FairPay rules that strengthen overtime protections.

Under the new FairPay rules, workers earning less than \$23,660 per year — or \$455 per week — are guaranteed overtime protection. This will strengthen overtime rights for 6.7 million American workers, including 1.3 million low-wage workers who were denied overtime under the old rules.

[Learn More About FairPay](#)

Click on any of the seminars below to learn more about the new "white collar" regulations. The seminar can be paused or forwarded just like a VCR or DVD. Click on the underlined words in



the slides and script for links to the regulatory text, preamble, fact sheets and other related documents. For optimal viewing, set your screen size to 1024 X 768. You can also [download this seminar](#) for your own training event.

<http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm>